

IN THE MATTER OF	:	BEFORE THE
DEBORAH SMITH	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 07-031C

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DECISION AND ORDER

On February 4, 2008, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Deborah Smith for a Home-Based Contractor conditional use in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district, filed pursuant to Section 131.N.27 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Andrew Robinson and David Carney, Esquires, represented the Petitioner. Deborah Smith testified in favor of the petition. Those in opposition to the petition agreed that Kenny Livesay, who resides at 822 Hoods Mill Road, would act as the opposition spokesperson. Kenny Livesay, Gary Applebaum, and Kelli Capozzoli testified in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The subject property is located in the 4th Election District on the west side of Hoods Mill Road about 1,900 feet from Route 97 and is also known as 820 Hoods Mill Road (the "Property"). It is referenced on Tax Map 08, Grid 5, as Parcel 204. The Property is part of a four-lot subdivision (the "Hinzman Subdivision").

2. The 4.87-acre quadrilateral shaped parcel, which is close to the Howard County/Carroll County Line, is initially accessed from a shared, one-lane paved driveway that becomes tar and chip and gravel based as it winds northwest to the Property. At the Property's entrance, the driveway changes to stone and gravel and curves to the northwest past two small accessory buildings situated on the driveway's south and a larger two-level accessory building, which is the subject of this petition. The driveway merges with a roundabout north of the accessory building, then ends at the northwest side of a square, one-story single-family detached dwelling situated about 200 feet from the subject accessory building. Excepting open areas along the driveway and around the buildings, the property is mostly wooded. The Property's eastern section is a wooded conservation easement area that inclines to the northeast. The western section is also a wooded conservation easement area that slopes down to a stream.

Vicinal Properties. All adjacent properties are also zoned RC-DEO. Parcel 123 to the north is improved by a two-story, single family detached dwelling situated about 425 feet northeast of the subject accessory building. This parcel has separate driveway access to Route 97. According to the supplement, there are four additional lots along the common boundary/shared pipestem driveway, the improvements on these lots known as 818, 822, 824, and 828 Hoods Mill Road. The first three addresses (818, 822, and 824) are part of the same subdivision and the lot sizes and residences are similar. The fourth lot is larger, about 15.32-acres.

3. Lot 1 to the east is improved with a 3,000-square foot, two-story, single-family detached dwelling situated about 400 feet from the subject accessory building. It shares the same driveway with the Property (which is Lot 2), as does Lot 3, to the Property's south. Lot 3 is improved with a two-story, single-family detached dwelling situated about 125 south of the subject accessory building. The Lot 3 dwelling is visible from the Property, in part because it sits at a lower elevation. Parcel 250 to the west is a large farm tract, which is wooded in the area adjoining the Property.

4. Roads. MD 97 has two travel lanes and about 21 feet of paving within an existing variable right-of-way. The posted speed level is 35 miles per hour and actual vehicle speed appears to be higher. Sight distance from the shared driveway is about 325 feet to the northwest, due to a curve in MD 97. The same curve and topography limits sight distance to the southeast to about 185 feet. There is no current State Highway Administration traffic volume data for this section of MD 97. Based on 1992 data giving the traffic volume on MD south of the Carroll County line as 3,981 average daily trips, the Technical Staff Report ("TSR") estimates the current traffic volume is likely higher.

5. The Property is served by private water and septic facilities.

6. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Rural Conservation." The General Plan Transportation Map depicts MD 97 as a Minor Arterial.

7. The Petitioner proposes to operate a home-based contractor office and storage space for her invisible fence contracting business in a portion of the 2,280-square foot accessory building on the Property. According the petition supplement, the Petitioner desires to operate a central office facility for the sale and installation of her invisible fence concern, currently operating

under the name Invisible Fence of Maryland. The central office facility and business items storage would be housed solely in the two-level accessory building. Only one full-time, non-resident employee would work in the accessory building, doing phones sales, data entry, secretarial work, and other similar types of light office work.

Two installation service technicians who each operate a commercial vehicle that will be parked off-site at night would arrive at the site between 7:00 and 9:00 a.m. in the morning and stay for about 15-30 minutes to pick up or drop off material and/or supplies, complete paperwork or other related matters. The employees would park in the roundabout area, which is 100 feet from the closest property to the south and 75 feet from the closest property to the north. The estimated total number of contractor daily trips is six.

All business storage would be confined to the accessory building. The business would use a 30' by 15' portion of the first floor and a 10' by 10' area in the lower level for storage. All business-related storage will be confined to the accessory structure. The total use of the use is 4,991 feet, 550 feet of interior use and 4,441 feet for parking.

8. During the proceeding, the Petitioner revised the petition supplement (apparently in response to comments in the TSR, which recommends denial) and now proposes that no clients will visit the Property for emergency purchases. The Petitioner also agreed, as a condition of approval, to restrict employee parking to the southern half of the roundabout.

9. The Petitioner testified to being sole owner of a pet containment business that uses a small Chevy (Astro) van and a full-size Chevy van. In the winter, the business operates out of one vehicle. The service technicians do not come back during the day. Some installation materials are stored in the vehicles and the wiring and transmitters will be stored in the accessory

building's lower level. The sole full-time employee arrives in a compact vehicle and oversees the fieldwork. The business slows down significantly in the winter and then picks up for about a nine-month cycle.

10. During my questioning of the Petitioner, I explained that I observed the site around 2:00 p.m. on a Saturday afternoon shortly before Christmas and that I had some difficulty turning left into the driveway from the northbound lane and then right (south) onto MD 97 when leaving the Property. I noted that much of the traffic seemed to be coming from Carroll County and that many vehicles had Christmas trees on their roofs. She stated that the level of traffic was atypical because there were several Christmas tree farms just into Carroll County. Mr. Livesay stated that this level of traffic was akin to weekday rush hour traffic.

11. The Petitioner introduced into evidence the exhibits as follows.

- (1). Final Plat of the Hinzman Property dated October 27, 2007 and approved January 11, 1999. Note 21 references a waiver on the length of the pipestem.
- (2). Exhibits 2-22. Photographs numbered 2 through 22.

12. The Opposition introduced into evidence the exhibits as follows.

- (1). Nine photographs of Mr. Levisay's property (the "Lack of Screening" photographs) taken shortly before the proceeding.
- (2). An aerial photograph showing the driveway and area dwellings.
- (3). An aerial photograph depicting the subject property and relative elevations.
- (4). Twelve photographs depicting the entire driveway ("Driveway Safety").
- (5). A copy of Petitioner's Exhibit 1 (the Hinzman Property") depicting 7 properties with access to the pipestem driveway.
- (6). Four photographs showing the bus stop/driveway entrance ("Bus Stop Safety") taken about two weeks before the proceeding.
- (7). Photographs of a car accident between two residents.
- (8). Twelve photographs showing the condition of the driveway.

13. Referring to the photographs in Petitioner's Exhibit 1, the Petitioner testified that they show the ability of two cars to pass each other on the driveway or use a pullover. They also show

forest conservation areas and undergrowth around the accessory building, which she stated provide a good buffer between the use and neighboring properties.

14. During cross-examination, the Petitioner testified that the needed technical equipment would be placed on the trucks for delivery, since customers were not going to come onto the property. She also stated that in a rare instance she or her husband/partner would make a weekend delivery because the technicians did not work on weekends.

15. Referring to Opponent's Exhibits 1, 2, and 3, Mr. Livesay testified that in the winter the deciduous woods do not screen either the driveway he shares with the Petitioner or the subject accessory building. They also show the accessory building's visibility from the driveway and the properties uphill to the north, which by their higher elevation would have a mostly clear view of the proposed use in winter. He also stated that the only screening of the accessory building in the winter is from the 48-foot strip on his property.

16. Referring to Opponent's Exhibit 4, Mr. Livesay testified that the 12 photographs show the driveway's narrowness, which is 9.5 feet in most places and 12 feet where it was tarred and chipped this summer. He stated that photographs 6-9, which show his truck and a smaller SUV vehicle on the driveway, depict the driveway's narrowness. The 11th photograph depicts the small bridge.

17. Mr. Livesay testified that seven properties use or have right-of-way access to the driveway, and the limit is six (Opponent's Exhibit 5). (780 Hoods Mill Road has an easement down to the driveway, but this property apparently does not currently use it for access to MD 97.) He also testified that road was not constructed according to the recorded plat (Petitioner's Exhibit 1). Note 14 on that plat requires the driveway to be a minimum of 12 feet in width (wider for

multiple residence) and to be constructed of 6 inches of compacted crusher run base with a tar & chip coating. He is concerned that the driveway's width is unsafe for the use.

18. Referring to Opponent's Exhibit 6, Mr. Livesay testified that the four photographs depict parents, cars, and children waiting at the driveway entrance at MD 97 for school buses, which arrive three times in the morning between 7:00 and 9:00 a.m. and three times in the afternoon. He stated that residents have called the County about the intersection's safety because traffic backs up when the bus stops, and drivers cannot see around the bend in the road. It was his opinion that more traffic would worsen the problem (photograph 4). He also stated, as the spokesperson, that two residents had told him they had an accident on the driveway within the last year because they could not see each other (Opponent's Exhibit 7).

19. Referring to Opponent's Exhibit 8, Mr. Livesay testified the photographs depict the crumbling and sinking of the driveway blacktop up to a small concrete bridge/culvert. The neighbors repaired the bridge two years ago, but it now has a crack on the other side. The driveway becomes tar and chip at about the location shown in the 12th photograph. He and another neighbor paid for the 700-foot tar and chip section, which was laid down last summer, but based on his personal use, it is not an optimum solution because it is dusty and noisy. It was his opinion that the sale of certain items was a retail use, which the General Plan discourages.

20. On cross-examination, he stated the "lack of screening" photographs show the rear of the accessory building, which provides access to the lower level, and that he can see part of its front. With respect to his property, there is a row of cypress trees and a privacy fence that screens the side of his house, and the accessory building also partly visible. He stated that the screening would not mitigate the dust and noise in the winter.

21. Gary Applebaum testified that he had an accident on the driveway at his entrance (but not related to visibility) and that the bridge had twice been replaced. He often has to back up to let people pass and there is only one pullover that cannot be used in bad weather. It was his testimony that additional traffic would worsen conditions.

22. Kelly Capozzoli testified that she has seen multiple accidents relating to the school bus because people cannot see driving around the bend. In response to questioning that the Petitioner would modify the employee schedules to work around school bus pickups, she stated it was not feasible because school hours are always changing and the bus is often late. She also has to wait when turning into the driveway. She testified to being the person in the accident depicted in Opponent's Exhibit 7, which happened because the other person did not see her (partly because trees block the view).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

1. General Plan. The Howard County General Plan designates the area in which the Property is located as a "Rural Conservation" Area. The proposed use of the Property as a residence and business office is a low intensity use. The total area of the Property to be used for the home-based contractor business is less than 5,000 square feet, which less than the 10,000 square foot area permitted. The setbacks and buffers generally appear to be adequate, if approval of the use were conditioned on additional landscape buffering and restricting parking to the side of the roundabout closest to the subject accessory building. The TSR concludes the increased use of the shared driveway is contrary to the somewhat isolated rural character of the immediate

neighborhood. In my view, however, the shared driveway criteria applicable to the conditional use anticipates that a home-based contractor might locate in an isolated, rural RC zoning district.

Such locational matters notwithstanding, Chapter 3 of the 2000 General Plan, "Preservation of the Rural West," observes that peak traffic conditions on MD 97 result from strong regional traffic conditions (pg. 54). It states the need for improvements (widening, realignment) must be studied along the length of each road to ensure that any such improvements are balanced against loss of scenic character. On that same page, the Plan observes that "[t]he major issue for many western roads is not capacity, but safety" ... on rural, two-lane roadways that have no shoulders and are very winding resulting in poor sight distances. Policy 3.5 makes a number of recommendations intended to mitigate traffic congestion and improve traffic safety in the Rural West.

Clearly, the General Plan recognizes that traffic safety is a priority concern in the Rural West. As can be seen in Petitioner's Exhibit 5, an aerial photograph of the neighborhood, MD 97 in this part of the County is a narrow, curving, two-lane rural road with poor sight distance. It is also clear the proposed home-based contractor conditional use is not in harmony with the General Plan's traffic safety goals. The Petitioner has not demonstrated that the location of the site with respect to streets giving access to the site is in harmony with the General Plan's land uses and policies. Importantly, the Petitioner's evidence and testimony about access concerned the shared driveway's safety, not MD 97's, which gives access to the site.

The Property is accessed from a shared driveway accessed at a section of MD 97--a regional traffic corridor—that has unique problems associated with any motorist seeking to access the driveway from the northbound lane or to exit the driveway and make a left hand turn

onto that same northbound lane (See Petitioner's Exhibits 17-19). Along this section of MD 97 are signs alerting motorists to traffic safety problems, railroad signs to the north, bus stop signs, and at least one sign cautioning motorists to slow down to 20 miles per hour (see Opponent's Exhibit 6). Those in opposition testified to traffic backups along MD 97 and multiple accidents relating to the school bus—which stops at the driveway entrance to pick up students at the same time employees would arrive--because people could not see driving around the bend. The TSR notes the limited sight distance at the driveway's intersection with MD 97. The Maryland State Highway Administration recommends denial unless sight distance is improved. Moreover, when I visited the site on a Saturday afternoon (albeit just before Christmas), I found turning into the driveway to be challenging.

Additionally, I am also not persuaded the Petitioner has adequately demonstrated that the almost 1,800-foot shared pipestem driveway itself provides safe access. The Petitioner's photographic evidence depicts a pullover, just before the immediate driveway entrance to her Property, and the ability of a vehicle to pull partly off the road onto the shoulder. In contrast, Opponent's Exhibit 3, photographically demonstrates the difficulty a large van and smaller van would have in safely passing each other on several segments. Accordingly, the location of the Property with respect to streets giving access to the Property, are such that the use is not in harmony with the land uses and policies indicated in the General Plan for the district. The petition does not comply with Section 131.B.1.

1. Adverse Effect: Section 131.B.2 of the Zoning Regulations requires me to determine whether the proposed use will have adverse effects on vicinal properties beyond those ordinarily associated with a home-based contractor in an RC-DEO zoning district.

(a) The proposed use will be conducted principally indoors and will exceed all setback requirements (if parking were restricted to the south part of the roundabout). No outdoor lighting is proposed. Although the proposed use is located near the end of a long shared pipestem driveway, in my view, employee access would only minimally intrude on the neighborhood. Although the employees' use of the driveway will generate some noise and dust, these are inherent operational characteristics of the conditional use, not atypical effects. Any noise, odor, or light generated by the uses will be attenuated by distance and will not be greater than that ordinarily associated with a home-based contractor in an RC-DEO zoning district. I therefore conclude the use will therefore not generate excessive noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions beyond those inherently associated with a home-based contractor office operation an RC-DEO zoning district.

(b) Structures and Landscaping. No new structures are proposed. The location and nature of the two-level accessory building will not hinder or discourage the development and use of adjacent land and structures more at the subject site than generally elsewhere, in compliance with Section 131.B.2.b of the Zoning Regulations.

(c) Parking and Drives. Parking is adequate for the proposed use and if restricted to the southern section of the roundabout, would be properly located. However, no screening is proposed and as the opposition's photographs demonstrate, the parking area would be visible in winter, contrary to Section 131.B.2.c's requirement that the parking area and driveway be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

(d) Safe Access. As discussed above, sight distance is inadequate and the driveway cannot be safely accessed off MD 97 to provide maximum safety. The proposed use does not comply with Section 131.B.2.d.

II. Specific Criteria for Home-Based Contractors (Section 131.N.27)

1. Because the Property is 4.87-acres in size, up to three commercial vehicles may be parked on the site and the Petitioner notes that the two technicians will park off site overnight. The proposed use accords with Section 131.N.27.a.

2. The total area of the use is 4,991 feet (550 feet of interior use and 4,441 feet for parking), which is less than 10,000-square feet, in accordance with Section 131.N.27.b.

3. The two-level accessory building proposed to be use for the home-based contractor use is about 100 feet from the closest property to the south. If employee parking were as restricted to the south side of the roundabout it would be 100 feet from the northern lot line, in accordance with Section 131.N.27.c.

4. As discussed above, were employee parking confined to the south side of the roundabout, the proposed use would not be a nuisance to the residents of neighboring properties due to noise, dust, or fumes, given the location of loading areas, parking, and driveways in relation to neighboring properties, in accordance with Section 131.N.27.d.

5. Section 131.N.27.e requires the petitioner to demonstrate the use will not result in damage to or deterioration of the shared driveway or in increased hazards to other driveway users. The Petitioner testified that the proposed use would not cause such harms. Those in opposition testified the mere fact of the use would damage or deteriorate the shared driveway. When a Petitioner presents evidence that such harms would not ensue, the burden then shifts to

the opposing party to present evidence of such harms. The preponderance of evidence does not convince me that the mere fact of the use would damage or deteriorate the driveway. In my view, the intent and purposed of the regulations is to ensure that the type of vehicle used in the operation and the nature of the home-based contractor operation is appropriate to a driveway shared with other uses, which in this case, it is. The full-time employee drives a compact car and the two technicians use one small compact van and a full-size van, all of which appear to be of similar size and types as those used of the residents, as demonstrated by the opponents' photographic exhibits.

Nonetheless, as discussed above, I am persuaded the Petitioner has not met her burden of demonstrating the use will not increase hazards to other driveway users. The addition of two-three vehicles making about six daily trips on a narrow driveway will likely increase an already hazardous situation. The proposed use does not comply with this aspect of Section 131.N.27.e.

6. As discussed above, the employee parking area will be visible to an adjoining property in winter months and no landscaping is proposed to screen it. The proposed use does not comply with Section 131.N.27.f.

7. No new structures or additions are proposed. The two-story accessory use is compatible with other structures in the neighborhood, in compliance with Section 131.N.27.g.

No minor vehicle repairs are proposed. Section 131.N.27.h does not apply.

III. Opposition Testimony

Those in opposition to the proposed use, as well as county agency comments and the TSR, give considerable weight in their assessment of the use to the fact the shared driveway apparently does not meet County requirements for length, width, and construction materials. The Fire

Department recommends denial for this reason and for its concern that the bridge will not allow emergency vehicle access due to weight restrictions. As Hearing Examiner, I am permitted to consider only whether the proposed use complies with the Zoning Regulations. I do not believe it was the intention of the legislature to confer upon me the responsibility to also interpret and apply the myriad subdivision and land development regulations applicable to every project. That is the role and expertise of DPZ.

ORDER

Based upon the foregoing, it is this 4th day of March 2008, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of Deborah Smith for a Home-Based Contractor conditional use in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

MICHELE L. LEFAIVRE

Michele L. LeFaivre

Date Mailed: 3/7/08

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.

